MOTION FILED

JAN 29 1981

No. 80-429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,
Petitioners,

v.

ALBERTA GUNTHER, VALENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* ON BEHALF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL UNION UAW, NATIONAL TREASURY EMPLOYEES UNION, AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Of Counsel:

J. ALBERT WOLL
General Counsel, AFL-CIO
815 15th Street, N.W.
Washington, D.C. 20005

WINN NEWMAN
General Counsel, IUE
CAROLE WILSON
1126 Sixteenth Street, N.W.
Washington, D.C. 20036

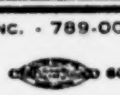
RICHARD B. SOBOL
MICHAEL B. TRISTER
SOBOL & TRISTER
910 Seventeenth Street, N.W.
Washington, D.C. 20006
(202-223-5022)

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
(*Counsel of record*)

Counsel for Amici

[List of Counsel continued on inside cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001



JOHN FILLION
General Counsel, UAW
MARLEY S. WEISS
800 E. Jefferson Avenue
Detroit, Michigan

ROBERT TOBIAS
General Counsel, NTEU
JOHN BUFE
SUSAN SILBER
1730 K Street, N.W.
Washington, D.C. 20006

CATHERINE WAELDER
Associate General Counsel, NFFE
1016 16th Street, N.W.
Washington, D.C. 20036

Dated: January 28, 1981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-429

THE COUNTY OF WASHINGTON AND
SHERIFF WARREN BARNES, IN HIS CAPACITY AS
SHERIFF OF WASHINGTON COUNTY,
Petitioners,

v.

ALBERTA GUNTHER, VELENE M. VALLANCE,
MARION E. VANDER ZANDEN AND YVONNE M. HATTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL UNION UAW, NATIONAL TREASURY EMPLOYEES UNION, AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), et al., move pur-

suant to Rule 36.3 of the Rules of this Court, for leave to file the attached brief *amici curiae* in support of the position of respondents in this case. Consent to the filing of this brief has been declined by the petitioners.

INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 13,500,000 employees throughout the United States.

The International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC, and its affiliated locals are the collective bargaining representatives for employees at nearly 1,000 companies in electrical equipment and related industries. IUE represents more than 300,000 persons, some 100,000 of whom are women.

The International Union UAW, which represents approximately 1,250,000 employees, is the largest industrial union in this country.

The National Treasury Employees Union (NTEU) represents 125,000 federal employees in a dozen agencies and in many different occupations.

The National Federation of Federal Employees (NFFE) represents 150,000 federal employees, fifty per cent of whom are women.

The labor movement's interest in this case and its efforts to assure equality of employment opportunity for its members is most simply stated by reference to the IUE's extensive program of enforcement of Title VII and other applicable civil rights laws.* A major con-

---

* See *Brief Amicus Curiae of International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC* in *Northwest Airlines, Inc.* v. *Transport Workers Union of America, AFL-CIO*, No. 79-1056.

cern of the IUE enforcement program has been the problems of discrimination against women in compensation. IUE, together with its locals and members, have instituted a number of cases under Title VII alleging that the rates for jobs traditionally performed by women were systematically depressed by the major electrical manufacturers, at a time when their workforces were sex segregated, because of the availability of women workers at low rates, and that the discriminatory "women's rates" were not eliminated at the time that the jobs were desegregated. These cases seek correction of the original intentional discrimination against women as a class. See, *e.g.*, *International Union of Electrical, Radio and Machine Workers* v. *Westinghouse Electric Corp.*, 631 F.2d 1094 (3d Cir. 1980), *petitions for cert. pending*, Nos. 80-944, 80-781. If the position argued by petitioner in this case were sustained in its full breadth it would preclude IUE from challenging these systems under Title VII.

ISSUE TO BE COVERED

In the attached brief *amici curiae*, we argue that the Bennett Amendment to Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), incorporates into Title VII, the basic substantive standard of the Equal Pay Act, 29 U.S.C. § 206(d). This means, we believe, first that claims of sexual discrimination in compensation based solely on comparisons of unequal jobs are excluded from Title VII as they are from the Equal Pay Act; but, second, that the Amendment does *not* exclude from the reach of Title VII other sexually discriminatory compensation practices. This

interpretation, which, in our view, best accords with both the language and relevant legislative history of both acts, is different from that presented by the parties, or, to our knowledge, by any other *amicus curiae.*

Respectfully submitted

Of Counsel:

J. ALBERT WOLL
General Counsel, AFL-CIO
815 15th Street, N.W.
Washington, D.C. 20005

WINN NEWMAN
General Counsel, IUE
CAROLE WILSON
1126 Sixteenth Street, N.W.
Washington, D.C. 20036

JOHN FILLION
General Counsel, UAW
MARLEY S. WEISS
800 E. Jefferson Avenue
Detroit, Michigan

ROBERT TOBIAS
General Counsel, NTEU
JOHN BUFE
SUSAN SILBER
1730 K Street, N.W.
Washington, D.C. 20006

CATHERINE WAELDER
Associate General Counsel, NFFE
1016 16th Street, N.W.
Washington, D.C. 20036

Dated: January 28, 1981

RICHARD B. SOBOL
MICHAEL B. TRISTER
SOBOL & TRISTER
910 Seventeenth Street, N.W.
Washington, D.C. 20006
(202-223-5022)

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
(*Counsel of record*)

Counsel for Amici

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
SUMMARY OF ARGUMENT	2
ARGUMENT	2
CONCLUSION	29

TABLE OF AUTHORITIES

Cases:

Albermarle Paper Co. v. *Moody*, 422 U.S. 405 (1975)	3, 4
Ammons v. *Zia Co.*, 448 F.2d 117 (10th Cir. 1971)	28
Bendix Aviation Corp., 10 War Lab. Rep. 40 (1943)	16
Burdine v. *Texas Department of Community Affairs*, 608 F.2d 563 (5th Cir. 1979), *cert. granted*, 100 S.Ct. 3009 (1980)	29
Calage v. *University of Tennessee*, 544 F.2d 593 (8th Cir. 1978)	28
DiSalvo v. *Chamber of Commerce*, 568 F.2d 593 (8th Cir. 1978)	28
Dothard v. *Rawlinson*, 433 U.S. 321 (1977)	4, 5
EEOC v. *Aetna Ins. Co.*, 22 FEP Cases 607 (4th Cir. 1980)	29
Fitzgerald v. *Sirloin Stockade*, 624 F.2d 945 (10th Cir. 1980)	29
Franks v. *Bowman Transp. Co.*, 424 U.S. 747 (1976)	3, 24
General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976)	28
General Electric Co. and Westinghouse Elec. Corp., 28 War Lab. Rep. 666 (1945)	16
General Motors Corporation, 11 War Lab. Rep. 745 (1943)	16
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971)	3, 4

TABLE OF AUTHORITIES—Continued

Page

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977) 3, 23, 25
IUE v. *Westinghouse Electric Corp.*, 19 FEP Cases 450 (D.N.J. 1979), *rev'd*, 631 F.2d 1094 (3d Cir. 1980), pets. for cert. pending, Nos. 80-781, 80-944 ..... 4, 29
Lemons v. *City of Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 49 U.S.L.W. 3250 (October 6, 1980) 28-29
Los Angeles Dept. of Water & Power v. *Manhart*, 435 U.S. 702 (1978) 4, 5, 6, 9
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1974) 3
Orr v. *MacNeill & Sons, Inc.*, 511 F.2d 166 (5th Cir. 1975) 28, 29
Roesel v. *Juliet Wrought Washer Co.*, 596 F.2d 183 (7th Cir. 1979) 29
Stastny v. *Southern Bell Tel. & Tel. Co.*, 628 F.2d 267 (4th Cir. 1980) 28
Steelworkers v. *Weber*, 443 U.S. 193 (1979) 6
United Airlines, Inc. v. *McMann*, 434 U.S. 192 (1977) 25
United States v. *Fisher*, 2 Cranch 358 (1805) 22
Woodwork Manufacturers v. *NLRB*, 386 U.S. 612 (1967) 22

Statutes and Regulations:

Equal Pay Act of 1963, 29 U.S.C. § 206(d) ..... *passim*
Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ..... *passim*
30 Fed. Reg. 14927-28 (1963), 29 C.F.R. § 1604.7 (1966) 24, 26, 27
37 Fed. Reg. 6836 (1972), 29 C.F.R. § 1604.8(a) (1980) 24, 27

TABLE OF AUTHORITIES—Continued

Legislative Materials:	Page
108 Cong. Rec. 14755 (1962)	16
108 Cong. Rec. 14765-71 (1962)	15, 16
109 Cong. Rec. 9197 (1963)	20
109 Cong. Rec. 9209 (1963)	20
109 Cong. Rec. 9761 (1963)	20
110 Cong. Rec. 7217 (1964)	7-8
110 Cong. Rec. 13647 (1964)	8-9
110 Cong. Rec. 15896 (1964)	9-10
111 Cong. Rec. 13359 (1965)	10-12
H.R. 8898, 87th Cong., 1st Sess. (1961)	13
H.R. 10226, 87th Cong., 2d Sess. (1962)	13
H.R. 11677, 87th Cong., 2d Sess. (1962)	15
H.R. 3861, 88th Cong., 1st Sess. (1963)	17
H.R. 1151, 88th Cong., 1st Sess. (1963)	17
H.R. 6060, 88th Cong., 1st Sess. (1963)	19
S. 882, 88th Cong., 1st Sess. (1963)	17
S. 910, 88th Cong., 1st Sess. (1963)	17
H. Rep. No. 1714, 87th Cong., 2d Sess. (1962)	15
H. Rep. No. 309, 88th Cong., 1st Sess. (1963)	19
Hearings on H.R. 8898 and H.R. 10226 Before the Select Subcommittee On Labor of the House Committee on Labor, 87 th Cong., 2d Sess. (1962)	14, 15
Hearings on S. 882 and S. 910 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess. (1963)	17
Hearings on H.R. 3861 and Related Bills Before the Special Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess. (1963)	17, 18, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-429

THE COUNTY OF WASHINGTON AND
SHERIFF WARREN BARNES, IN HIS CAPACITY AS
SHERIFF OF WASHINGTON COUNTY,
Petitioners,

v.

ALBERTA GUNTHER, VALENE M. VALLANCE,
MARION E. VANDER ZANDEN AND YVONNE M. HATTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICI CURIAE* ON BEHALF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL UNION UAW, NATIONAL TREASURY EMPLOYEES UNION, AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES

This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

SUMMARY OF ARGUMENT

The question presented in this case does not concern the meaning of the basic prohibitions stated in § 703(a) of the Civil Rights Act of 1964. Rather the question turns on the extent to which the Bennett Amendment included in § 703(h) limits the applicability of those prohibitions to claims of sex discrimination in compensation. Petitioners' contention, in essence, is that normal Title VII principles are inapplicable to such claims and that unless a case can be made out under the Equal Pay Act of 1963 there is no Title VII violation. It is our position that Congress harmonized these two laws by incorporating into Title VII the two basic decisions made in the Equal Pay Act—that unequal pay to women for "equal" work is a *per se* violation subject to four stated defenses and that this strict liability rule does *not* apply to "comparable" work—and, that Congress intended Title VII's general principles to govern other sex discrimination in compensation claims. In the argument that follows, we show that petitioners' contention cannot be squared with the relevant Title VII and Equal Pay Act statutory language and legislative history and that, on balance, the interpretation we suggest accords best with the relevant Congressional materials.

ARGUMENT

I

A. Title VII states in general terms a prohibition of discrimination in:

> . . . hire . . . compensation, terms, conditions or privileges of employment because of . . . race, color, religion, sex or national origin, [and of employment practices that] . . . limit, segregate or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any in-

> dividual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin. [42 U.S.C. § 2000e-2(a).]

Congress' intent in enacting these prohibitions was "to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin . . ., and [Congress] ordained that its policy of outlawing such discrimination should have the 'highest priority'." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976), citing *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). See also *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1974); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975). To achieve this purpose, Congress "proscribed not only overt discrimination, but also practices that are fair in form, but discriminatory in operation." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). In *Teamsters* v. *United States*, 431 U.S. 324, 335-36, n. 15 (1977), this Court described the two basic types of discrimination interdicted, and the applicable standards of proof:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. . . . Claims of disparate treatment may be distinguished from claims that stress "disparate impact". The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necesisty. . . . Proof of discriminatory motive,

> we have held, is not required under a disparate impact theory. [Citations omitted.]

See also *Dothard* v. *Rawlinson*, 433 U.S. 321, 328-329 (1977).

Unless Congress specified otherwise, under the plain language of the Act as interpreted by the Court, the following practices would appear to be unlawful under Title VII:

> —"an employer tells a female worker, not employed at a position that is substantially equal to that performed by a male, that he would pay her $30 a week more if she was male." *Gunther* v. *County of Washington*, 623 F.2d 1303, 1313 (9th Cir. 1980);
>
> —"an employer pays welders more than plumbers for the reason that 'the majority of welders are men and the majority of plumbers are women.'" *IUE* v. *Westinghouse Elec. Corp.*, 631 F.2d 1094, 1100 (3d Cir. 1980), *petitions for cert. pending*, Nos. 80-781, 80-944;
>
> —"an employer . . . isolate[s] a job category which was traditionally all female [and] arbitrarily cut[s] the wages of that job class for the sole reason that its holders were female . . ." See *IUE* v. *Westinghouse Elec. Corp.*, 19 FEP Cases 450, 457 (D.N.J. 1979), *rev'd*, 631 F.2d 1094, *supra*.

All of the foregoing are examples of "disparate treatment" in setting wages adversely affecting women, accompanied by clear evidence of "discriminatory motive."[1]

---

[1] The "disparate impact" analysis was developed by this Court in the context of facially neutral practices that are used to select from among a group of applicants or employees, see *Griggs* v. *Duke Power Co.*, 401 U.S. at 430-33; *Dothard* v. *Rawlinson*, 433 U.S. at 329; *Albermarle Paper Co.* v. *Moody*, 422 U.S. at 425, and it is an open question whether it applies to non-selection procedures used to determine compensation for a job classification. See *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 710-11,

Indeed, these examples appear indistinguishable in principle from *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). In that case, "a female employee took home less pay than a male employee earning the same salary" (*id.* at 705) because the employer "required female employees to make monthly contributions to the [pension] fund which were higher than the contributions required of comparable male employees." (*Id.*). The Court held: "Such a practice does not pass the simple test [under Title VII] of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different." *Id.* at 711. And the Court specified that the unequal contribution requirements constituted unlawful discrimination in "compensation" on grounds of sex. *Id.* at 712, n. 23.

These conclusions are entirely unexceptional. Congress spoke in broad language in Title VII. Thus, unless it is otherwise indicated, the general principles stated in the Act certainly apply where the result is within both the letter and spirit of the statute.

Petitioners argue, however, that Congress intended Title VII to make unlawful only those sexually discriminatory compensation practices already unlawful under the Equal Pay Act of 1963, 29 U.S.C. § 206(d). That Act's substantive standard states:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employ-

---

n.20 (1978). If the disparate impact analysis does apply, then compensation practices "neutral in their treatment of different groups that in fact fall more harshly on one group than another and cannot be justified by business necessity" would also appear to be unlawful under the general prohibitions of Title VII.

> ees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex; Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage of any employee.

In other words, the Equal Pay Act provides that it is unlawful sexual discrimination *per se* for an employer to pay employees of one sex less than employees of the other for doing "equal jobs" within the meaning of the Act, unless one of the four stated exceptions to this prohibition applies.

On petitioners' theory, all of the compensation practices described above, pp. 4-5, would be lawful under Title VII, although none has any connection to the question treated in the Equal Pay Act of the relationship between male and female jobs. In particular, under petitioners' theory, the compensation discrimination found by the Court in *Manhart* would be lawful, at least as to women who are in all-female job classifications.[2] To paraphrase this Court's statement in *Steelworkers* v. *Weber*, 443 U.S. 193, 204 (1979), it would be "ironic indeed if [the Equal Pay Act], a law triggered by the Nation's concern over" compensation discrimination against women, resulted in the exclusion from Title VII of a wide variety of com-

---

[2] There was no showing or discussion in *Manhart* as to whether the entire class of women performed "equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions" as did men.

pensation practices that discriminate on grounds of sex, which practices are prohibited by Title VII where they discriminate against other groups protected by that statute.

Congress did, to be sure, take account of the Equal Pay Act in its deliberations on Title VII and did indicate an intent to harmonize the two laws. But, Congress did not intend to approve all discriminatory pay practices not covered by the very narrow prohibitions contained in the Equal Pay Act. While the legislative materials do not specify the exact relationship of Title VII and the Equal Pay Act in the clearest possible terms, those materials do demonstrate that petitioners' position is untenable.

B. The only guidance in the language or legislative history of Title VII as to the intended relationship of that Act and the Equal Pay Act is the following:

First, Senator Clark, Senate floor manager of the fair employment provisions of the 1964 bill, prepared written responses to certain "objections" that had been made to the legislation and entered these in the record. The objection referring to the Equal Pay Act and Senator Clark's response thereto are as follows:

> Objection. The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitation in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.
>
> Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike Title VII. Furthermore, under Title VII, jobs can no longer be classified as to sex, except where there is a rational basis for dis-

> crimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII. [110 Cong. Rec. 7217 (1964).]

Second, on June 16, 1974, after the Mansfield-Dirksen bill had been adopted as a substitute for the bill passed by the House, and after cloture had been invoked, Senator Bennett offered an amendment that resulted in the addition of the following language as the second sentence of § 703(h):

> It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)). [42 U.S.C. § 2000e-2(h).]

The discussion of the Bennett Amendment from its introduction to its adoption consumed only a few moments. The entire colloquy is as follows:

> Mr. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.
>
> By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word "sex" has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word "sex" in the bill and in the Equal Pay Act.

> The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.
>
> I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand[ing], I shall ask that the amendment be voted on without asking for the yeas and nays.
>
> Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.
>
> Mr. DIRKSEN. Mr. President, I yield myself 1 minute.
>
> We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.
>
> All that the pending amendment does is recognize those exceptions, that are carried in the basic act.
>
> Therefore, this amendment is necessary, in the interest of clarification. [110 Cong. Rec. 13647 (1964).]

The amendment was then adopted. *Id.*[3]

Third, when the Civil Rights Bill, as amended in the Senate, was returned to the House, Judiciary Committee Chairman Celler, the sponsor of the original House bill, made a brief statement setting out the major Senate actions and stated therein:

---

[3] The only other discussion of the Bennett Amendment in the Senate debate on the 1964 Act is a colloquy between Senators Humphrey and Randolph set out in this Court's opinion in *Los Angeles Dept. of Water* v. *Manhart*, 435 U.S. at 714, n.25. This colloquy sheds no light on the issue in this case. See also the Court's discussion of the colloquy in *Manhart*, 435 U.S. at 714-15.

> The Senate amendment [to the House bill] also . . . provides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex—Section 703[(h)]. [110 Cong. Rec. 15896 (1964).] [4]

---

[4] One year after Title VII had been enacted into law Senator Bennett expanded on the original explanation of his amendment quoted above in a statement on which petitioner places great weight:

> Mr. BENNETT. Mr. President, we have just finished our work on the voting bill which again involved a decision by the Senate to invoke cloture. Fortunately, there were comparatively few amendments to be voted on, after cloture, and they could be handled in an orderly manner. The fact that they were, reminded me of the completely different situation that prevailed when the Senate a year ago was voting, after cloture, on amendments to the civil rights bill.
>
> On 2 days, June 16 and 17, 1964, there were 56 rollcall votes on amendments which were properly before the Senate. Those 56 votes proceeded in an atmosphere of complete chaos because most of the Senators offering amendments had already used up so much of their allotted hour of debate that there was barely time available to call up many of the amendments and no time to discuss them. This resulted in action by the Senate without the creation of any legislative history. Thus, the Senate failed in its responsibility to give sufficient guidance to those in the executive branch and elsewhere to those who must intepret and apply the amendments adopted.
>
> As an example of what has occurred because of the confusion and near chaos that prevailed on those days, I find myself today under the necessity of trying to create legislative history that should have been created then.
>
> I offered an amendment to the Civil Rights Act of 1964 before cloture was invoked, but when I called up my amendment after cloture the Senate was driving toward final passage of the bill. Though my amendment was acceptable both to the Senator in charge of the bill, the then Senator from Minnesota, and to the minority leader, I was urged by these gentlemen not to take any time to explain the amendment. I followed their recommendations, the amendment was adopted, and now my purpose is being questioned.

[4] [Continued]

That part of the bill represented by my amendment was the subject of a law review article which questioned the intent of the amendment.

* * * * *

Now I find myself, nearly a year later, with the responsibility of clearing up the confusion thus inadvertently created.

In order to do that, Mr. President, I ask unanimous consent to have printed in the RECORD both the appropriate excerpt from the law review article, which raises the question, and a brief prepared by my staff which contains an explanation that should have been made last June.

There being no objection, the excerpt and brief were ordered to be printed in the RECORD, as follows:

* * * * *

RELATION OF TITLE VII TO THE EQUAL PAY ACT: AN EXPLANATION OF THE BENNETT AMENDMENT

Section 703(h) of the Civil Rights Act of 1964 states: "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of action 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

The amendment speaks in terms of a differentiation * * * authorized by the provisions of Section 6(d) of the Fair Labor Standards Act."

Section 6(d) authorizes two things:

1. Wage differentials as between exempt male and female employees doing the same work; and

2. Wage differentials on equal jobs made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

The amendment therefore means that it is not an unlawful employment practice: (a) to differentiate on the basis of sex in determining the compensation of white collar and other employees who are exempt under the provisions of the Fair Labor Standards Act; or (b) to have different standards of compensation for nonexempt employees, where such differen-

[4] [Continued]

tiation is not prohibited by the equal pay amendment to the Fair Labor Standards Act.

Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act. [111 Cong. Rec. 13359 (1965).]

Following the introduction of these materials, Senator Bennett introduced an amendment to the Senate rules governing cloture. The following colloquy then occurred between Senator Bennett and Senator Dirksen:

Mr. DIRKSEN. Mr. President, without commenting on the proposal to modify rule XXII, I am somewhat surprised that the question arose with respect to the amendment.

First, it was carefully examined by me, and also by my staff, whom I deem to be competent and quite schooled in the entire 1964 Civil Rights Act.

Second, it was submitted and carefully examined by the then Senator from Minnesota and now the Vice President of the United States. We accepted it as indicated, on the basis of the intent which was in the mind of the Senator from Utah when he submitted the amendment.

I trust that will suffice to clear up in the minds of anyone, whether in the Department of Justice or elsewhere, what the Senate intended when that amendment was accepted.

Of course, we were under great pressure at the time to try to complete action on the bill and to get it over to the other body.

I hope that the Senator from Utah will understand why we showed what might be regarded as unseemly haste, but at the time I thought it had to be done.

However, let me emphasize and pinpoint the fact that we had in mind precisely the point made by the Senator from Utah when the amendment was submitted, and I believe that the language speaks for itself.

Mr. BENNETT. Mr. President, my intention is represented by the statement I have inserted again in the RECORD today.

I thank the minority leader for giving me this opportunity to try to straighten out the situation, even if it is 1 year late. [111 Cong. Rec. 13359 (1965).]

Thus, Congress paid only fleeting attention to the problem presented here. Given the intensity of the controversy surrounding Title VII and the length of the debate, the startling point is how little was said on this subject. The limited materials that are available do however establish that Congress understood that Title VII not only covered the same ground as the Equal Pay Act but went far beyond the earlier legislation and that Congress intended that enforcement of the two Acts be harmonized. The Bennett Amendemnt was plainly intended to incorporate into Title VII something of the decisions made in the Equal Pay Act. However, as to particulars, the language of the Bennett Amendment is open to more than one reading. And the meaning of the accompanying explanatory statements is frequently opaque and those statements conflict with each other. Before drawing any more specific conclusions as to the question posed here, it is therefore necessary to consult the legislative history of the Equal Pay Act to determine the nature of the decisions made during consideration of that legislation.

C. The equal pay bill introduced in 1961 by the Kennedy Administration proposed to make it unlawful *per se* for an employer in commerce to discriminate between employees on the basis of sex "by paying wages to any employee at a rate less than the rate at which he pays wages to any employee of the opposite sex for work of comparable character on jobs the performance of which requires comparable skills." H.R. 8898, 87th Cong., 1st Sess. (1961); H.R. 10226, 87th Cong., 2d Sess. (1962). The only exception to this requirement was for payments "made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex." *Id.*

The legislative history leading ultimately to the enactment of the Equal Pay Act of 1963 demonstrates that Congress' principal concern with respect to the substantive reach of this proposal was with the desirability of

predicating strict liability on debatable conclusions as to the "comparability" of widely differing jobs held by men and women. This concern ultimately led to the enactment of an equal pay requirement only as between "equal" jobs. The debate on the substance of the Equal Pay Act was conducted within the limits just stated. The proponents did not seek to prohibit any discriminatory compensation practice other than the denial of equal pay for "comparable" work; the opponents did not raise other issues and the Congress did not consider, much less authorize, any other such practice.

1. The 1962 Hearings and Debates.

From the outset, the element which attracted the most concern and debate in the Congress was the proposal to require equal pay for "comparable" rather than "equal" work. Proponents of the legislation, such as Secretary of Labor Arthur Goldberg, testified that the comparability of different jobs could be determined through the use of recognized job evaluation procedures.[5] Opponents ar-

---

[5] I have had 25 years of experience representing the labor movement in negotiating labor contracts where the question of comparable work is an accepted concept not only with relation to women, but with relation to men. Job evaluation is a technique, a scientific technique, widespread throughout American industry, and hundreds of thousands and millions of jobs in American industry today are classified under job classification systems and compensation is paid on the bases of job evaluation systems which are predicated upon evaluation factors of which comparability of work is significantly one.

Hearings on H.R. 8898, H.R. 10226 Before the Select Subcommittee On Labor of the House Committee on Labor, 87th Cong., 2d Sess. 16 (1962) (hereafter cited as "1962 Housing Hearings . . ."). See also, *id.* at 12. The Secretary's arguments were supported by Assistant Secretary of Labor Esther Peterson, who described the job evaluation procedures used in industry to determine the value of jobs, 1962 House Hearings at 27; see also *id.* at 216, and by union representatives who testified in support of the bill. See 1962

gued that it was neither possible nor desirable to compare the worth of substantially different jobs.[6]

On May 17, 1962, the House Committee on Education and Labor reported an equal pay bill incorporating the "comparable work" standard. H. Rep. No. 1714, 87th Cong., 2d Sess. (1962). The committee bill, however, added an additional defense for wage differentials resulting from "a bona fide job classification program." H.R. 11677, 87th Cong., 2d Sess. (1962).

On the House floor the bill was further limited so as to allow only comparisons of jobs in the same place of employment. 108 Cong. Rec. 14765-67 (1962). In addi-

---

[5] [Continued]

House Hearings at 173 (testimony of James B. Carey, Secretary-Treasurer, AFL-CIO Industrial Union Department, and President, International Union of Electrical, Radio & Machine Workers); *id.* at 261 (testimony of Gerald R. Coleman, Executive Secretary, United Hatters, Cap & Millinery Workers International Union).

[6] Opposition to the Administration proposal was led in the 1962 Hearings by the National Association of Manufacturers:

> This use of "comparable" opens a Pandora's box of dispute. "Equal" is a definite word. At best, "comparable" is a dubious word frought with dispute inviting complications.
>
> The most conscientious administrator, given these broad terms, could find fairly, quite different types of work to be "comparable" in character or requiring "comparable skills." The bill does not provide any specific basis for determining what jobs require comparable skills. It is difficult to imagine how it could. These terms "comparable character" and "comparable skills" do not necessarily mean the same job. In fact, they are so general and so vague as to give an administrator a grant of power which would destroy the sound wage structure which many industrial companies have worked for years to perfect. This emphasizes the patent desireability of substituting "equal" for "comparable" in any reasonable consideration of the bill whether by its proponents or opponents.

1962 House Hearings at 166.

tion, the House amended the bill to restrict the comparison to "equal work on jobs the performance of which requires equal skills." 108 Cong. Rec. 14767-71 (1962).

In introducing this amendment, Representative St. George argued: "The word 'comparable' opens up great vistas. It gives tremendous latitude to whomever is to be arbitrator in these disputes." 108 Cong. Rec. 14767 (1962). Representative Hiestand, the ranking minority member on the Select Subcommittee which reported the bill, argued in support of the amendment:

> . . . I think there are few represetatives of labor or management who would claim that it is possible to develop a job-evaluation system which could be depended upon in all cases to produce fair and mutually acceptable determinations of "work of comparable character . . ." [108 Cong. Rec. 14755 (1962).]

See also 108 Cong. Rec. 14768 (1962) (Statement of Rep. Landrum).[7]

The 87th Congress adjourned before completing work on the legislation.

---

[7] Representative Zelenko, the Chairman of the Select Subcommittee and floor manager for the Committee bill, argued in support of the "comparable" work standard that it was possible to perform—"a realistic and practical appraisal of two jobs to determine whether they have enough like characteristics and skill demands to warrant the same basic pay rate," and he cited the orders and rulings of the National War Labor Board mandating equal pay for comparable jobs. 108 Cong. Rec. 14768-69 (1962).

The National War Labor Board had required the application of job evaluation to restructure wage scales according to the relative worth of men's and women's jobs. See, e.g., *General Motors Corporation*, 11 War Lab. Rep. 745 (1943); *Bendix Aviation Corp.*, 10 War Lab. Rep. 40, 45-46 (1943); *General Electric Co. and Westinghouse Electric Corp.*, 28 War Lab. Rep. 666, 685 (1945).

2. The 1963 Hearings and Debates.

In the first session of the 88th Congress, the Kennedy Administration submitted equal pay legislation which incorporated the "equal work" standard adopted by the House in the previous session and "the same place of employment" requirement. H.R. 3861, 88th Cong., 1st Sess. (1963); S. 910, 88th Cong., 1st Sess. (1963). In contrast to the earlier proposal, however, the bill did not include an exception for wage differentials established pursuant to bona fide job classification programs. *Id.* A number of other proposals were introduced based on the "comparable work" standard. See, e.g., H.R. 1151, 88th Cong., 1st Sess. (1963); S. 882, 88th Cong., 1st Sess. (1963).

During the 1963 hearings on this legislation, the principal area of contention continued to be the proposal to require equal pay as between different jobs based on proof of comparability. E.g., Hearings on S. 882 and S. 910 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess., 12-13 (1963) (statement of Senator Clifford Case in support of the comparable work standard); Hearings on H.R. 3861 and Related Bills before the Special Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess. 199 (1963) (hereafter cited as "1963 House Hearings . . .") (testimony of Council of State Chambers of Commerce); *id.* at 117 (statement of the Bendix Corporation); *id.* at 138, 145-46 (statement of John G. Wayman, Esq., all opposed to the comparable work standard). Employer representatives strongly disputed that job evaluation was a scientific process which could be objectively and uniformly applied in determining comparable worth. See, e.g., 1963 House Hearings at 237-38 (testimony of Ezra G. Hester for Corning Glass Works); *id.* at 170 (testimony of William Miller for Chamber of Commerce of the United

States); *id.* at 261 (testimony of Jerry N. Markham for Thatcher Glass Manufacturing Co.).

The employers argued that the "equal work" standard should itself be limited to require not only equality in skills, but equality in other factors traditionally taken into account in fixing wages, such as effort, responsibility and working conditions;[8] they also argued that the defenses in the bill for wages fixed pursuant to a seniority or merit incentive system were too narrow and that the bill should exclude wage differentials based on job classification systems and factors such as different costs to the employer. 1963 House Hearings at 95-98, 99-102 (testimony of W. Boyd Owens for Owens-Illinois Glass Co.); *id.* at 135 (statement of American Retail Federation); *id.* at 139, 146 (statement of John G. Wayman, Esq.); *id.* at 168, 171 (testimony of William Miller for the Chamber of Commerce of the United States); *id.* at 184 (testimony of Fred C. Edwards for Armstrong Cork Co.); *id.* at 194-95, 198-201, 206 (testimony of James E. Fagan for Council of State Chambers of Commerce); *id.* at 232-33, 238 (testimony of Ezra G. Hester for Corning Glass Works); *id.* at 307-08 (statement of S. Herbert Unterberger). Finally, a number of witnesses expressed concern that the phrase "place of employment" could be misinterpreted to allow comparisons of jobs in different facilities of the same employer. 1963

---

[8] In concurring in these arguments, Rep. Griffin stated:

> You don't have any idea and we don't either, if this bill were to pass, what the Secretary of Labor would say is equal work. There are thousands and thousands and thousands of job classifications which would be hanging in the balance until some representative of the Department of Labor came in and decided himself, on the basis of some general rule which the Department might try to lay down, which are difficult to apply, whether or not a classification, even though you agree with your union on it, is reasonable.

1963 House Hearings at 169.

House Hearings at 139, 146 (testimony of John G. Wayman, Esq.); *id.* at 194, 199 (testimony of James E. Fagan for Council of State Chambers of Commerce); *id.* at 279, 281 (testimony of John B. Olverson for Electronic Industries Association).

On May 20, 1963, the House Committee on Education and Labor reported an equal pay bill as an amendment to the Fair Labor Standards Act. H. Rep. No. 309, 88th Cong., 1st Sess. (1963). The bill not only retained the "equal work" standard, it was further narrowed to apply only to jobs equal in "skill", "effort", "responsibility" and "working conditions". H.R. 6060, 88th Cong., 1st Sess. (1963). In addition, the Committee added defenses for "a system which measures earnings by quantity or quality of production," and for differentials "based on any factor other than sex." *Id.*[9] Finally, the bill was modified to substitute the word "establishment" for the words "place of employment". *Id.*

H.R. 6060 was approved by the full House of Representatives in substantially the form recommended by the House Committee. The floor debates on this bill make clear that Congress' purpose in adopting the "equal work" standard, and in adopting the other limitations on liability, was to narrow the area in which strict liability would be imposed based on third party evaluations of the relationships between different jobs. Thus, Representative Goodell stated:

---

[9] The House Report explained the addition of the latter defense as follows:

> As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." [H. Rep. No. 309 at 3.]

> Last year when the House changed the word 'comparable' to 'equal' the clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.
>
> We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, 'Well, they amount to the same thing' and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal. I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort, and working conditions, is intended to make this point very clear. [109 Cong. Rec. 9197 (1963). See also 109 Cong. Rec. 9209].

In this form the bill was also passed by the Senate and became law. 109 Cong. Rec. 9761 (1963).

In summary, the hearings and debates leading to enactment of the Equal Pay Act make clear that in adopting an "equal work" standard, Congress determined that comparison of the skill and other elements of jobs should not be a litmus test for determining whether those jobs are properly paid except where the jobs involved are "substantially" the same. Although consideration was given to the nature of the statutory defenses and to the other provisions defining the bill's scope, the adoption of the "equal" work rather than the "comparable" work standard was the major substantive decision in the Congress. It is also clear that Congress addressed only the question of when equal pay should be required on the sole basis of a comparison of job duties. Congress did not consider whether or to what extent to prohibit other discriminatory wage practices or sexually discriminatory employment practices not involving pay. With this his-

tory in mind, we next consider the possible interpretations of the Bennett Amendment to determine which is most consistent with the statutory language and the Congressional purpose.

II

There are three possible interpretations of the Bennett Amendment and the related legislative history that have been suggested.

One is the interpretation urged by the petitioner—that by virtue of the Bennett Amendment no sexually discriminatory compensation practice is unlawful under Title VII unless that practice also constitutes a violation of the Equal Pay Act.

A second interpretation is that the Bennett Amendment incorporates, either in Title VII cases alleging equal work and unequal pay or in all Title VII cases alleging a sexually discriminatory pay practice, the four defenses stated in the Equal Pay Act.

A third interpretation is that Congress intended to incorporate into Title VII the substantive standards and the four defenses of the Equal Pay Act to govern the *type* of case with which the latter dealt—*viz.*, cases involving claims of equal pay based solely on comparisons of job duties.

Given the nature of the legislative materials, there are two basic approaches to the question presented. The first is to determine the Bennett Amendment's meaning, reading its language and that of the Equal Pay Act to which the Amendment expressly refers, most naturally. The argument for this approach is that the Amendment is, after all, the legislative act in question and that where the secondary materials do more to confuse than inform, a plain meaning rule should be followed. The second is to examine the statutory words in a manner that "reconstitute[s] the gamut of values current at the time

when the words were uttered" (*Work Manufacturers* v. *NLRB*, 386 U.S. 612, 620 (1967) (quoting L. Hand, J.)) and to conduct that examination as specified by Mr. Chief Justice Marshall "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . ." (*United States* v. *Fisher*, 2 Cranch 358, 386 (1805).)

As we show now, the four defenses interpretation is perfectly consistent with the plain meaning of the statute, but not with the lessons to be drawn from the Equal Pay Act debate or with Senator Bennett's contemporaneous explanation of his Amendment. The Equal Pay Act incorporation theory is plausible under a plain meaning approach and, on balance, most accurately reflects the total corpus of the legislative materials. Petitioners' suggested interpretation violates the plain meaning of the Bennett Amendment and attributes to Congress a purpose that is contradicted by the relevant legislative materials.

A. The "Four Defenses" Interpretation.

The Equal Pay Act provides that an employer who "within any establishment . . . pay[s] wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions," is engaged in sex discrimination, unless the payments are made "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." The Bennett Amendment, in turn, specifies that an employer who "differentiates upon the basis of sex" in paying his employees does not violate Title VII "if such differentiation" is "authorized by [the Equal Pay Act]." Literally, the only "differentia-

t[ions] upon the basis of sex authorized by the Equal Pay Act" are the practices which would have been defined as sex discrimination by that Act but for its four stated exceptions. And, of course, if those pay practices do not constitute sex discrimination even where equal work is involved (*viz.*, in the situation in which the differentiation is most suspect), as a matter of logic such practices would not be "discrimination" in the less clear cases in which the work done by men and by women is unequal. The foregoing makes sense out of, and takes account of, all the statutory language.

At the same time, it would be surprising for Congress in 1964, without any discussion of the point, to reverse the decision made a year earlier to require a showing of "equal" work as a predicate to an equal pay claim and at the same time carefully preserve the four defenses stated in the Equal Pay Act. That reverses the order of priorities in the 1961-1963 debate. Moreover, Senator Bennett's reference to the "very careful study" which accompanied consideration of the equal pay bill, as well as his expressed intent "that in the event of conflict, the provisions of the Equal Pay Act shall not be nullified," indicate a purpose to assure that the substantive decisions made by Congress in its consideration of equal pay legislation were not overridden by Title VII's broad prohibition against sex discrimination in compensation. Finally, Senator Clark's statement appears designed to refute the objection that Title VII "do[es] not include the limitation in [the Equal Pay Act] with respect to equal work . . ., and thus, cut[s] across different jobs." Cf. *Teamsters* v. *United States*, 431 U.S. at 352 ("It is inconceivable that § 703(h) . . . was intended to vitiate the earlier representations of the Act's supporters by increasing Title VII's" scope in this area).

B. The Equal Pay Act Incorporation Interpretation.

There is, as we have noted, a second interpretation that is consistent with the statutory language—that Congress intended to incorporate into Title VII the equal work requirement of the Equal Pay Act in cases involving claims for equal pay based solely on comparison of job duties.[10] That alternative, moreover, appears to reflect "the gamut of values current" in the 1963 and 1964 Congress.

A statute may reasonably be said to "authorize" conduct that it does not prohibit when the legislative materials demonstrate that a broader prohibition was considered and rejected on the ground that such a prohibition would be unsound. The deliberations of the Congress in connection with the Equal Pay Act show that Congress considered a *per se* requirement of equal pay based on evidence of job comparability and determined for reasons of policy to reject such a requirement.

This interpretation of the word "authorized" meets the concern expressed by Sen. Bennett in that incorporation of the equal work standard insures that Title VII will not conflict with the Equal Pay Act or with any Congressional decisions embodied in the earlier Act. This

---

[10] It does not follow, however, that by the adoption of the Bennett Amendment Congress intended to restrict the *coverage* of equal pay requirements under Title VII to employers covered by the Fair Labor Standards Act. "The thrust of [§ 703(h)] is directed toward defining what is and what is not an illegal discriminatory practice . . . ." *Franks* v. *Bowman Transp. Co.*, 424 U.S. at 761. Nothing in the 1964 legislative history of the Bennett Amendment indicates any intention to limit the coverage set forth in Section 701(b). In fact, Sen. Clarks' statement on this point is squarely to the contrary, see pp. 7-8, *supra*. From the beginning, the EEOC has interpreted the Bennett Amendment as addressing substantive and not coverage issues. See 30 Fed. Reg. 14928 (1965), 29 C.F.R. § 1604.7 (1966); 37 Fed. Reg. 6836 (1972), 29 C.F.R. § 1604.8(a) (1980).

approach is also consistent with Sen. Clark's rebuttal of the expressed concern over comparisons that "cut across different jobs," and with his statement that "[t]he *standards* in the Equal Pay Act for determining discrimination as to wages . . . are applicable to *the comparable situation* under Title VII." (Emphasis added).

Representative Celler's statement does not point to a different conclusion. His statement must be narrowed in some manner, because it is obvious that compliance with the Equal Pay Act does not satisfy all of the various requirements of Title VII relating to discrimination on grounds of sex. It is reasonable to assume that Representative Celler, like Senator Clark, referred to the requirements of Title VII governing equal pay based on job comparisons.

Senator Bennett's statement and Senator Dirksen's response on the floor of the Senate in 1965, see *supra*, note 4, are not authoritative as guides o the legislative intent. Their colloquy took place more than a year after passage of Title VII and in the context of unrelated legislation. To the extent the last sentence of Senator Bennett's memorandum goes beyond the language of his amendment and his contemporaneous explanation, the Senator's colleagues were not informed of his intent before they voted and he was not constrained by the necessity of crafting a proposal that would secure their approval. It is for these reasons that, so far as we are aware, or petitioners show, this Court has never relied on a post-legislative statement that is more expansive than the original. See *Teamsters* v. *United States*, 431 U.S. at 354, n.39; *United Airlines, Inc.* v. *McMann*, 434 U.S. 192, 200, n.7 (1977). The only significance of Sen. Bennett's 1965 statement is as evidence of the "chaos" and "confusion" that accompanied the adoption of his amendment in 1964, and this itself undercuts the sweeping interpretation urged by the petitioners.

Further, the 1965 Bennett statement itself is contradictory as it first indicates that the Equal Pay Act only authorized wage differentials as between exempt employees and as permitted by the four defenses, but then concludes that "discrimination in compensation on grounds of sex does not violate Title VII unless it also violates the Equal Pay Act". The conclusion does not follow from Senator Bennett's analysis. In any event, Senator Bennett's statement did not consider the issue presented here of whether Title VII prohibits discriminatory compensation practices that depend upon more than comparisons of job duties in unequal jobs.

The original interpretation of the Bennett Amendment by the EEOC in 1965 also supports the interpretation we suggest. The EEOC Regulation, not unlike Senators Clark and Bennett, was explicitly concerned with avoiding "conflicting interpretations or requirements with respect to situations in which both statutes are applicable." [11] With reference to such situations, the 1965 EEOC

---

[11] See 30 Fed. Reg. 14927 (Dec. 2, 1965), 29 C.F.R. / 1604.7 (1966). The full text of the relevant portion of the interpretation regulation is as follows:

> (a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.
>
> (b) Accordingly, the Commissions will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator. Wage and Hour Division,

Regulation interpreted the Bennett Amendment "to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII." The other early EEOC materials cited by petitioner, Bf., pp. 81-88, are all to the same effect.[12]

C. Petitioners' Interpretation.

In contrast to the two possibilities just reviewed, petitioners' interpretation cannot be reconciled with the language of the Bennett Amendment. Ordinarily, statutes are not said to "authorize" all that they do not forbid. In legislating, Congress may, but need not and on the whole does not, take an entire subject in hand. The normal course is to build the "law" piece by piece, attending to one problem as defined by a bill's proponents and then another, through discrete prohibitions. A synthesis—a codification—may emerge, or it may not. So long as there is no synthesis, subjects related to the one treated in terms by a federal statute are simply not regulated by federal law. There is nothing in the language of the Equal Pay Act demonstrating an intent by Congress to deviate from its normal course and "authorize" all sexually discriminatory pay practices not there prohibited.

Department of Labor. These interpretations are four in 29 Code of Federal Regulations. Part 800 119-800.163. Relevant opinions of the Administrator interpreting "the equal pay for equal work standard" will also be adopted by the Commission.

(c) The Commission will consult with the Administration before issuing an opinion on any matter covered by both Title VII and the Equal Pay Act.

30 Fed. Reg. 14928 (1965)

[12] The 1965 Regulation constituted the EEOC's broadest interpretation of the exemption from liability resulting from the Bennett Amendment. Compare 30 Fed. Reg. 6836 (1972), 29 C.F.R. § 1604.8; Attachments to Letter from General Counsel, EEOC to Clerk, United States Court of Appeals, Third Circuit, in *IUE* v. *Westinghouse Elec. Corp.*, dated, Oct. 14, 1980

Petitioners' interpretation also does not square with the legislative materials respecting the enactment of the Bennett Amendment or with the Congressional purpose in 1963 when it limited the scope of the Equal Pay Act to "equal work". While these materials evidence an intent not to override decisions made in connection with the enactment of the Equal Pay Act, they do not lend any support to the view that Congress intended to insulate a wide variety of sexually discriminatory employment practices not examined in 1963.[13]

---

[13] There is nothing in the decision of this Court in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976) which supports petitioners' position. In *Gilbert*, the Court considered the relevance of the interpretations of the Wage and Hour Administrator under the Equal Pay Act on the question of whether a denial of benefits for disabilities relating to maternity constitutes a denial of *equal pay* for equal work. *Id.* at 144. The Court's reliance on the Bennett Amendment to indicate the applicability to Title VII of the requirements of the Equal Pay Act on this point indicates that the effect of the Amendment is not limited to the adoption of the four Equal Pay Act defenses, but it in no way implies that Title VII's prohibition against sex discrimination compensation is limited to denials of equal pay for equal work.

None of the lower court cases on which petitioner relies hold that the Bennett Amendment immunizes all sexually discriminatory compensation practices not forbidden by the Equal Pay Act. In *Ammons* v. *Zia Co.*, 448 F.2d 117 (10th Cir. 1971), *Orr* v. *MacNeill & Sons, Inc.*, 511 F.2d 166 (5th Cir. 1975), *Calage* v. *University of Tennessee*, 544 F.2d 297 (6th Cir. 1976), and *DiSalvo* v. *Chamber of Commerce*, 568 F.2d 593 (8th Cir. 1978), the plaintiffs claimed that they were denied equal pay for equal work. In *Ammons*, *Orr* and *Calage*, the claim was denied on the facts. In *DiSalvo*, the claim was sustained. There was no issue in these cases, and no discussion in the courts' opinions, of whether Title VII compensation claims not based on job comparisons are limited by the provisions of the Equal Pay Act. In *Stastny* v. *Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 281 (4th Cir. 1980), the court rejected a sex discrimination in compensation claim that was based solely on a comparison of the earnings of men and women in broad categories of jobs. In *Lemons* v. *City of Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 49 U.S.L.W. 3250 (October 6, 1980), the em-

CONCLUSION

The interpretation we suggest is consistent with the result reached by the court of appeals in this case. The court held that a *prima facie* case of discrimination in compensation may not be established under Title VII solely on the basis of evidence showing that the duties of unequal jobs performed by men and women were com-

---

ployer based its pay scales on wages for similar jobs prevailing in the community. The Court rejected the claim of the plaintiffs, a group of nurses, that because of historic discrimination in the society, their compensation should not be based on the compensation for nurses prevailing in the community, but on the compensation paid for other City and County jobs which they contended were "of equal worth to the employer." *Id.* at 229.

We note that there are other decisions in three of these circuits, not cited by petitioner, that hold or state that Title VII's prohibition against sex discrimination in compensation is not limited by the Equal Pay Act, or, at least, indicate that the question is open in the circuit. In *Fitzgerald* v. *Sirloin Stockade*, 624 F.2d 945 (10th Cir. 1980), the court expressly rejected the employer's claim that Title VII's prohibition against sex discrimination in compensation is limited to circumstances violative of the Equal Pay Act. "It was found that the plaintiff was discriminated against solely because of her sex in a manner that is not within the scope of the Equal Pay Act. This finding does not offend the Bennett Amendment and Equal Pay Act standards should not be controlling." *Id.* at 953 & n.2. In *EEOC* v. *Aetna Ins. Co.*, 22 FEP Cases 607 (4th Cir. 1980), an Equal Pay Act case, the Court stated "Title VII is broader [than the Equal Pay Act] and affords a worker the opportunity to challenge other discriminatory compensation practices." *Id.* at 611, n.5. In *Burdine* v. *Texas Department of Community Affairs*, 608 F.2d 563 (5th Cir. 1979), *cert. granted*, 100 S.Ct. 3009 (1980), a Title VII case in which plaintiff alleged a denial of equal pay for equal work, the court noted the decision of the Ninth Circuit in this case, and, without mentioning its own decision in *Orr*, left open the question of whether *Gunther* would be followed when the issue arose. See also *Roesel* v. *Juliet Wrought Washer Co.*, 596 F.2d 183 (7th Cir. 1978).

In addition, the position urged by petitioner has been rejected by the Ninth Circuit in this case and by the Third Circuit in *IUE* v. *Westinghouse Elec. Corp.*

parable, but remanded for consideration of other evidence of sex discrimination in compensation. 623 F.2d at 1321. This result is fully consistent with the statutory language and with the purposes of Title VII and the Equal Pay Act.

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Of Counsel:

J. ALBERT WOLL
General Counsel, AFL-CIO
815 15th Street, N.W.
Washington, D.C. 20005

WINN NEWMAN
General Counsel, IUE
CAROLE WILSON
1126 Sixteenth Street, N.W.
Washington, D.C. 20036

JOHN FILLION
General Counsel, UAW
MARLEY S. WEISS
800 E. Jefferson Avenue
Detroit, Michigan

ROBERT TOBIAS
General Counsel, NTEU
JOHN BUFE
SUSAN SILBER
1730 K Street, N.W.
Washington, D.C. 20006

CATHERINE WAELDER
Associate General Counsel, NFFE
1016 16th Street, N.W.
Washington, D.C. 20036

RICHARD B. SOBOL
MICHAEL B. TRISTER
SOBOL & TRISTER
910 Seventeenth Street, N.W.
Washington, D.C. 20006
(202-223-5022)

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
(Counsel of record)

Counsel for Amici

Dated: January 28, 1981